

RECORD OF TRIAL COVER SHEET

**IN THE
MILITARY COMMISSION
CASE OF**

UNITED STATES

V.

**ALI HAMZA AHMAD
SULAYMAN AL BAHLUL**

ALSO KNOWN AS:

**ALI HAMZA AHMED SULEIMAN AL BAHLUL
ABU ANAS AL MAKKI
ABU ANAS YEMENI
MOHAMMAD ANAS ABDULLAH KHALIDI**

No. 040003

**Military Commission Order No. 1, para. 6(D)(5) (Aug. 31, 2005)
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record of trial. A copy of the redacted version of this record of
trial is available at <http://www.defenselink.mil/news/commissions.html>.**

VOLUME ____ OF ____ TOTAL VOLUMES

**3RD VOLUME OF TRANSCRIPT: R. 408-457
APRIL 7, 2006 SESSION**

United States v. Ali Hamza Sulayman al Bahlul, No. 040003

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A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at <http://www.defenselink.mil/news/commissions.html>.

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Transcript and Review Exhibits are part of the record of trial, and are considered during appellate review. Volumes I-VI, however, are allied papers and as such are not part of the record of trial. Allied papers provide references, and show the administrative and historical processing of a case. Allied papers are not usually considered during appellate review. *See generally United States v. Gonzalez*, 60 M.J. 572, 574-575 (Army Ct. Crim. App. 2004) and cases cited therein discussing when allied papers may be considered during the military justice appellate process, which is governed by 10 U.S.C. § 866). For more information about allied papers in the military justice process, see Clerk of Military Commission administrative materials in Volume III.

VOLUME
NUMBER

SUBSTANCE OF CONTENTS

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| I* | Military Commission Primary References (Congressional Authorizations for Use of Force; Detainee Treatment Act; UCMJ articles; President's Military Order; Military Commission Orders; DoD Directive; Military Commission Instructions; Appointing Authority Regulations; Presiding Officer Memoranda—includes DoD rescinded publications) |
| II* | Supreme Court Decisions: <i>Rasul v. Bush</i> , 542 U.S. 466 (2004); <i>Johnson v. Eisentrager</i> , 339 U.S. 763 (1950); <i>In re Yamashita</i> , 327 U.S. 1 (1946); <i>Ex Parte Quirin</i> , 317 U.S. 1 (1942); <i>Ex Parte Milligan</i> , 71 U.S. 2 (1866) |
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VOLUME III OF TRANSCRIPT

United States v. Ali Hamza Ahmad Sulayman al Bahlul

Index of Transcript

FOURTH SESSION:

April 7, 2006

The same persons were present at the hearing who were there previously, except there was a change of court reporters. The Accused was absent from the proceeding. The Presiding Officer stated that the Accused's absence is knowing and voluntary (R. 409). [408-409](#)

Defense Counsel challenges the Presiding Officer for cause because the Presiding Officer makes more money on active duty than as a retiree. Defense Counsel states he will ask the Appointing Authority to excuse the Presiding Officer from participation in the case. [411-412](#)

The Presiding Officer provided additional information about the pay he receives after being recalled to active duty. [412-415](#)

The Presiding Officer states he will consider the Amicus Briefs filed on the issue of self-representation. [415-416](#)

Defense counsel argues that the Presiding Officer has authority to authorize self-representation. The limitation on self-representation violates the requirement in the President's Military Order (PMO) that the Accused receive a "full and fair trial." [416-422](#)

Military Commission Instruction (MCI) No. 4 states that the Accused must be represented at all times by military counsel. The Presiding Officer should either declare this provision inconsistent with the PMO, or interpret MCI No. 4 to permit "standby" counsel. Standby counsel would always be present to represent the Accused, but the Accused would have the ability to speak in court in the manner of counsel. [423-424](#)

Defense Counsel argues from *Faretta v. California*, 422 U.S. 806, that the right to self-representation is fundamental to a fair trial. Self-representation is a Constitutional right, and In re

United States v. Ali Hamza Ahmad Sulayman al Bahlul

INDEX (Cont.)

<u>DESCRIPTION</u>	<u>PAGE #</u>
Guantanamo, 355 F. Supp. 443-464, states that Constitutional rights are applicable to detainees at Guantanamo Bay, Cuba (R. 428). The Defense Counsel traces the history of the right of self-representation for 1789, and urges the Presiding Officer to grant the Accused this right in his military Commission proceeding.	<u>425-440</u>
The Prosecution argues that the nation is at war, and special wartime rules are applicable to Commission trials. The Accused should not be allowed unfettered self-representation (R. 442-443). Mandatory standby counsel should be required (R. 443). If the Presiding Officer should order self-representation, he should certify that issue, in light of the Appointing Authority's previous decision denying self-representation.	<u>441-444</u>
Presiding Officer states he will decide the self-representation issue in due course.	<u>447</u>
Discovery and scheduling were briefly discussed.	<u>447-448</u>
Defense Counsel stated he would attempt to find a suitable Yemeni person, as requested by the Accused, to assist in the representation of the Accused.	<u>450</u>
The Presiding Officer urged appointment of an additional counsel to represent the Accused, concluding, "However, if the United States wishes to prosecute Mr. al Bahlul, under the existing rules and regulations, it will require either a great deal more time than any reasonable person might want or it will require a second Defense Counsel on this case." (R. 452).	<u>450-452</u>
Presiding Officer sets a deadline for listing legal motions to be filed of April 18 th	<u>455</u>
Authentication Page for R. 408-457.	<u>457</u>

1 *The Commissions Hearing was called to order at 0922, 7*
2 *April 2006.*

3

4 **Presiding Officer:** The Commission will come to order.

5

6 **PROS:** All parties who were present when this Commission
7 last recessed are again present. I would note
8 that the Accused is absent.

9

10 **Presiding Officer:** Has the reporter changed?

11

12 **PROS:** Yes, sir, the reporter has been sworn. This is
13 Sergeant----

14

15 **Presiding Officer:** [REDACTED]

16

17 **PROS:** Sergeant [REDACTED] I am sorry, sir.

18

19 **Presiding Officer:** Thank you. MAJ Fleener, will Mr. al
20 Bahlul be in court today?

21

22 **DC:** He will not, Your Honor.

23

1 **Presiding Officer:** Is this his personal choice voluntary
2 given to you by him?

3

4 **DC:** It is, sir.

5

6 **Presiding Officer:** Thank you. Trial, that good enough for
7 you?

8

9 **PROS:** Yes, Your Honor.

10

11 **Presiding Officer:** I find that as in all other times in
12 which Mr. al Bahlul has been absent from these
13 proceedings in 2006, his absence is knowing and
14 voluntary. Accordingly, the proceedings will
15 continue.

16

17 I have been advised that the Assistant and the
18 Chief Clerk for Military Commissions have placed
19 all of the Review Exhibits on the local network
20 at OMC and on the Gitmo local network. If you
21 all need any help getting any of those REs off
22 there, go see one of them. Don't see me.

23

1
2 At your request, Major Fleener, we had an 8-5
3 conference yesterday. Trial concurred. We
4 covered several matters concerning how we will
5 handle various items today. No substantive
6 issues were addressed or decided. During the
7 course of this session I will mention various
8 matters, which were discussed at that conference.
9 If either side wishes to put any more on the
10 record, feel free.

11
12 The current POM listing, as of the latest POM
13 change on the 21st of March is at RE 183. The
14 current Filings Inventory is RE 191.

15
16 Since our last session, we have added Exhibits
17 168 through 192 to the Review Exhibit Listing.

18
19 At our last session, I gave the Defense leave to
20 file supplemental matters concerning the
21 challenge for cause against the Presiding
22 Officer. He did so in D 104 at RE 180. The

1 Prosecution replied in D 104 A at RE 182. The
2 Defense has not yet filed a reply.

3

4 Do you intend to file a reply, Major Fleener?

5

6 **DC:** I do not, Your Honor, other than to argue that
7 the question should be certified.

8

9 **Presiding Officer:** Do you want to say that right now?

10

11 **DC:** Yes, sir. I think that the issue regarding
12 whether it is proper that you serve as a
13 Presiding Officer in this case and whether you
14 grant Mr. al Bahlul's challenge for cause is
15 something that should be decided, while
16 ultimately it can be decided by you, it should be
17 decided by Mr. Altenburg. He is the individual
18 who selected you personally for this position.
19 He is the individual whom is in charge of these
20 entire proceedings and especially in light of the
21 additional filings that I have sent off earlier
22 this week regarding a difference in--a pecuniary
23 difference between your current income and the

1 income before you came on active duty, and
2 because I believe your answers that you make more
3 money now than before you came--recalled to
4 active duty. Because that is your answer,
5 because of the appearance that you would have an
6 incentive to stay on active duty, and Mr.
7 Altenburg should be the person to decide whether
8 you should be Presiding Officer.

9
10 **Presiding Officer:** Okay. I will not wait for any more
11 filings. I will issue any necessary supplement
12 to my ruling. That supplement to the ruling
13 will, well I will issue a necessary supplement to
14 the ruling which will contain the matters to
15 whether or not I am going to certify this as a
16 interlocutory question.

17
18 Major Fleener mentioned Defense supplemental voir
19 dire questions. Those are at RE 189.

20
21 We had an 8-5 conference this morning. At that
22 conference I showed to Trial and Defense my
23 latest LES, my latest travel voucher, and my

1 latest, well my driver's license. My driver's
2 license and the LES show that I am drawing VHA at
3 the rate for my quarters. The travel voucher
4 shows the start of my travel at my quarters and
5 the finish of my travel at my quarters.

6

7 Trial, Defense, you both had a chance to look at
8 those documents. Do you agree?

9

10 **PROS:** Yes, sir.

11

12 **DC:** Yes, sir.

13

14 **Presiding Officer:** The LES and Travel Voucher will be
15 marked as 192 and sealed.

16

17 I hereby further state as a fact that my BAH is
18 based on the location at which I live. I further
19 state as a fact that each and every TDY voucher I
20 have filed has shown my home address as the start
21 point and the end point. I further state as a
22 fact that I have not received any TDY payments
23 except for periods when I was on TDY.

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Question 4(a)(8) on RE 189 says, "Do you submit monthly accrual TDY vouchers?" I do not.

Seven, "Are you considered to be TDY where you work?" No.

Six, I do not work at OMC in Arlington, Virginia. I work at my quarters.

Nine, I do not receive TDY payments when I am performing duties at my quarters.

One, my current military salary is approximately \$10,000 greater, based on my last 1040 than what I got before I came on.

"Do I currently receive any income or other monetary or non-monetary benefit?" Other than my current military salary, other than interest and dividend income; no.

1 And that answers all of the questions that were
2 in RE 189.

3

4 At our last session, I gave the Defense leave to
5 file a motion to allow Mr. al Bahlul to go pro se.
6 He did so in D 105, which is at RE 181. The
7 government responded in D 105 Alpha at RE 190. At
8 that R.C.M. 802 session yesterday, Major Fleener,
9 you advised me that you did not intend to file a
10 reply, rather given the numerous filings contained
11 in the P102 filing inventory, you preferred to
12 argue the issue. Is that correct?

13

14 **DC:** Yes, Your Honor. In addition the three----

15

16 **Presiding Officer:** Well, I haven't gotten there yet.

17

18 **DC:** Yes, sir.

19

20 **Presiding Officer:** The Defense forwarded to me two briefs
21 from non-parties on the issue of self-
22 representation. On 5 April 2006, I directed the
23 Assistant to the Presiding Officers to advise all

1 parties that they might refer to and argue the
2 contents of those briefs, which are appended as
3 RE 186 and RE 187. The Defense forwarded a third
4 brief from a non-party on the same issue and I
5 gave the same directions to the Assistant. That
6 brief is at RE 188.

7
8 Major Fleener?

9
10 **DC:** Sir, for the last--sir in this last few months,
11 you and the other Presiding Officers have heard
12 Defense attorneys complain that the rules or
13 procedures are changed constantly. It certainly
14 has been a theme. We believe it is true and it
15 is difficult to practice in this system.

16
17 But there are also some principles of law that
18 are so fundamental that they have to be in this
19 system and they just aren't there. And, I would
20 submit to you that the most fundamental thing
21 that must be there, is the right of self-
22 representation.

1 And, Your Honor, must accept and recognize that
2 Mr. al Bahlul has a right to proceed pro se.

3
4 The--and this is how, an example of how
5 interesting, I use the word "interesting" the
6 system is, and how difficult it is to practice is
7 that the United States agrees that he should be
8 allowed to proceed pro se. Where they recognize
9 that in order for it to be a full and fair trial
10 in accordance with the President's Order--he must
11 be allowed to proceed pro se. I appreciate their
12 candor. They admitted that in 2004 and the lead
13 prosecutor admitted it just a few days ago in
14 2006, and I appreciate their candor. That is the
15 right answer.

16
17 It is unfortunate that the Secretary of Defense
18 and his delegees have chosen to--they have chosen
19 the hard wrong over the easy right, which is
20 tough to do.

21
22 You have the authority to allow Mr. al Bahlul to
23 proceed pro se. During voir dire you said that

1 if you believed that the rules did not comport
2 with the law, that you believed you are
3 independent enough to rule against Mr. Altenburg
4 or go against Mr. Altenburg and do what complies
5 with the law.

6
7 The question is, what is the law? There were
8 three briefs, amicus briefs, that were filed in
9 this case. One came from the National Institute
10 of Military Justice, very esteemed attorneys that
11 have represented military personnel and have been
12 involved in the policy making and working with
13 the Manual for Courts-Martial and other public
14 policy concerns for military justice. They
15 support self-representation. Why? Because it is
16 the right thing to do. Because it comports with
17 the law.

18
19 Another brief you received was from some
20 attorneys in Wyoming, law professors and various
21 public and private attorneys in Wyoming. That
22 was at RE 186. That amicus brief was written in
23 a way supporting the right of self-

1 representation, and it was done in a rather
2 interesting way, which is through the eyes of the
3 attorney and some of the ethical issues a lawyer
4 faces when put in the position of representing
5 someone who doesn't want them there.

6
7 And finally, you received last week another
8 amicus brief from Lieutenant Bill Kuebler, who is
9 one of the Defense attorneys who is on another
10 case who is in a similar situation and whose
11 issue is going to be coming before this
12 Commission some time or another.

13
14 Lieutenant Kuebler wrote an amicus brief with
15 another interesting perspective. And I grab from
16 Lieutenant Kuebler's brief the portion that--I
17 don't want to call it a hook, but what I would
18 ask Your Honor to consider when deciding whether
19 you have the authority to do this, and on page 2,
20 the last paragraph on page 2 of RE 188, the
21 President's Military Order provided a mechanism
22 for avoiding conflict between Commission Law and
23 other relevant sources of law. The PMO requires

1 each Accused to be tried by Military Commissions
2 and they receive a full and fair trial.

3
4 So the question for you, sir, is whether the
5 rules that have been set up by the delagees of
6 the Secretary of Defense, and the Secretary of
7 Defense himself, provide for a full and fair
8 trial. If the rules don't provide for a full and
9 fair trial, then they violate the President's
10 Military Order. Your charge, as you said, for
11 the last 2 years, is to provide the Accused a
12 full and fair trial in compliance with the
13 President's Order.

14
15 So the question is whether the rules provide for
16 a full and fair trial. I assert that in a--in a
17 way, and I was trying to--because this system is
18 unique in the way it is set up--the military
19 justice system is unique to people on the
20 outside, but this system is even more unique,
21 even to military justice people, because of the
22 various roles individuals serve.

1 And I was--I spent some time trying to figure
2 out, analogize the various players in this system
3 to the various roles in a normal system. And I
4 think for the purpose of this argument, you
5 should--this is no different, at least as I see
6 it, as essentially the President being the
7 Constitution; "full and fair trial." His
8 delegaees, being the Secretary of Defense and the
9 General Counsel, being Congress; writing laws.
10 And you are the judge. Now when a judge sees a
11 law that doesn't comply with the Constitution,
12 the law is unconstitutional. You just don't
13 apply the law.

14
15 In this case you look at every rule, what you
16 should be doing, is looking at every rule, every
17 instruction and say, "Does that comply with the
18 President's mandate of a full and fair trial?"
19 If it does, we drive on. If it doesn't, you
20 strike that provision or don't apply that
21 provision. That is what judges do.

1 And just as you--it can be reviewed on appeal by
2 appellate court judges and the Supreme Court
3 ultimately makes decision regarding whether laws
4 are constitutional or not, but it starts at the
5 district court level, it starts at the state
6 court level, and judges say yes, or no.

7
8 And in this particular case, the answer is clear.
9 It should be clear. It is clear to [pointing
10 towards the Prosecution table] them, the United
11 States, the prosecutors. It has certainly been
12 argued by us for 2 years. It is clear to Amici,
13 the briefs that have been filed, and quite
14 frankly it is clear to everybody that the right
15 of self-representation is one of those
16 fundamental rights that must be recognized if you
17 are going to provide Mr. al Bahlul or any other
18 military detainee, or excuse me, Guantanamo Bay
19 detainee, a full and fair trial.

20
21 You have that right to be independent. You told
22 me you were going to be independent. I would
23 respectfully ask that you exercise your

1 independent authority and find that MCI Number 4,
2 the provision of MCI Number 4, which says that
3 the Accused must be represented by military
4 counsel at all times, even regardless of his
5 expressed intent to proceed pro se, doesn't
6 comply with the full and fair trial requirements.
7

8 In the alternative, you could decide that that
9 rule, the only way that that particular provision
10 can be read to comply with full and fair trial
11 requirement that the President gives you, is to
12 say that implicit in MCI Number 4 is--because
13 self-representation is full--is required to be
14 full and fair that, that he must be represented
15 at all times may--the way to comply with that is
16 to allow standby counsel to serve in the capacity
17 of standby counsel.
18

19 Is a standby counsel in a strict--a strict
20 definition of the word, "represent," representing
21 somebody? No, but is it not too much of a
22 stretch to say that affording standby counsel,
23 mandating standby counsel, will comply with the

1 full and fair trial requirement and comply with
2 MCI Number 4? I think it does. I think that you
3 can say, standby counsel will always--there must
4 be standby counsel. One, because MCI Number 4
5 says so. Two, because there are going to be
6 issues of national security and access to
7 evidence.

8
9 But--so standby counsel must be there, but, the
10 Accused gets to talk. It is his trial. So I
11 don't think you have certify this up. If you
12 believe that this issue needs to be addressed,
13 then I would ask that you certify this question
14 up to Mr. Altenburg at the Appointing Authority's
15 office. But you have the authority to do this
16 yourself, and respectfully, you should exercise
17 that authority.

18
19 The right is fundamental. I read your response,
20 your findings of fact, conclusions of law, found
21 at PO 102 N and I don't have the RE off the top
22 of my head, but in that, you made various

1 findings of fact, conclusions of law, and denied
2 Mr. al Bahlul his right to proceed pro se.

3
4 Respectfully, sir, and you discussed MCI Number
5 4, the conclusions of law that you made were
6 consistent with the memorandum, the short
7 memorandum by Mr. Altenburg in August of 2005,
8 which is in RE 118, and I don't remember which
9 particular page it is. It is a very long exhibit
10 and the record is probably fairly clear on that.

11
12 And with all due respect to you and to Mr.
13 Altenburg, the issue that you addressed was
14 whether Mr. al Bahlul would do a good job
15 representing himself; whether he has complete
16 access to the evidence; how are his language
17 skills; how--does he understand the rules or
18 procedures--those are--that is not what makes it
19 full and fair.

20
21 I read from Faretta, Faretta versus California,
22 422 U.S. 806, and it--Faretta mentions that the
23 test isn't whether a guy is going to do a good

1 job, it--it's whether he has the right to do it
2 to start with. Competence, his ability to
3 represent himself isn't the issue. It's whether
4 he is competent to make the decision to represent
5 himself, which may be to his detriment, often
6 times it is to his detriment, but that is the
7 decision.

8
9 Illinois versus Allen, "The right to defend is
10 personal. The defendant, and not his lawyer or
11 the state will bear the personal consequences of
12 a conviction. It is the defendant, therefore,
13 who must be free personally to decide whether, in
14 his particular case, counsel is to his advantage.
15 And although he may conduct his -- defense
16 ultimately to his own detriment, his choice must
17 be honored out of that respect of the individual,
18 which is the lifeblood of the law."

19
20 **Presiding Officer:** Could you please give us the cite on
21 that.

22
23 **DC:** Yes, sir.

1

2 **Presiding Officer:** Is that internal to Faretta?

3

4 **DC:** Yes, sir, it is----

5

6 **Presiding Officer:** Okay, let the record reflect he is
7 quoting from Faretta. You don't have to give the
8 cite on it. It is in Faretta. That is what I
9 thought.

10

11 **DC:** Yes, sir. It is in Faretta, it is citing
12 Illinois versus Allen in an earlier case, a
13 concurring opinion by Judge Brennan, Justice
14 Brennan.

15

16 But the respect of the individual, which is the
17 lifeblood of the law, that rings of full and
18 fair. If something is the lifeblood of the law,
19 it is presumed to be fair, otherwise I would hope
20 it wouldn't be the lifeblood of the law.

21

22 What Mr. al Bahlul, how he conducts his own
23 defense, it is of no relevance. His access to

1 evidence may be of some relevance. His ability
2 to understand the differences and the various
3 cultures and the difference between Islamic law
4 and, I am not going to use Commission Law, but
5 whatever the law is that applies here, is of
6 probably a limited consequence.

7
8 But there can be no doubt that the man is
9 intelligent. There can be no doubt that he is
10 respectful, that he is articulate, that he
11 doesn't want me or any other attorney there. If
12 he is competent to make that decision, he is
13 competent to waive his right to counsel and
14 proceed pro se.

15
16 In your opinion--excuse me, in your ruling you
17 asked--that you had been provided no authority
18 that the 6th Amendment applies to Military
19 Commissions. And, there is no authority that the
20 6th Amendment applies to Military Commissions
21 except in Judge Green's opinion, *In re Guantanamo*
22 *Detainee Cases*, 355 F. Supp. at 443-464 in the
23 D.C. District Court. In light of the Supreme

1 Court's decision in Rasul, it is clear that
2 Guantanamo Bay must be considered the equivalent
3 of a U.S. territory in which fundamental
4 constitutional rights apply.

5
6 So, if we assume that fundamental constitutional
7 rights apply at Guantanamo Bay, then the next
8 question is, what are those fundamental
9 constitutional rights. The 6th Amendment is one
10 of those fundamental constitutional rights. We
11 know it is a fundamental constitutional right and
12 it is imposed on the state through the 14th
13 Amendment, which it doesn't do unless it is a
14 fundamental right.

15
16 The right of self-representation is a fundamental
17 right. Even if the court doesn't want to say
18 that the 6th Amendment applies to Guantanamo Bay,
19 I think that there is--there is--I did some
20 reading regarding that Guantanamo Bay detentions
21 of Haitians back in 1992, and there appeared to
22 be some pressure on people not wanting to

1 recognize what rights apply in various locations,
2 including Guantanamo Bay.

3
4 The 5th Amendment might apply. Forget the 6th
5 Amendment. What about the 5th Amendment? What
6 about the due process clause? I have heard
7 counsel this week argue that some process must be
8 due, just not "due process," or something like
9 that. It was in a different case and it
10 certainly wasn't the defense attorney who argued
11 that.

12
13 Due process is not two words that you separate
14 from one another and say, "Okay, there is
15 process; that must be due." "Due process" is a
16 legal term of art. It is something that we use
17 all the time and due process is essentially, what
18 are the fundamental trial rights--what are the
19 fundamental rights that everybody has? In a
20 criminal case, what are those fundamental
21 criminal trial rights that everyone has?
22

1 Faretta at 818, talks about the 6th Amendment
2 incorporated into the 14th Amendment. If it is
3 in the 14th Amendment it is in the 5th Amendment.
4 The due process clause, every Court of Appeal, or
5 Courts of Appeal in the United States has
6 recognized the due process clause also has the
7 right of counsel. It comes from two different
8 places federally; the 6th Amendment and the 5th
9 Amendment.

10
11 In Faretta at 817, implicit in the 5th
12 Amendment's guarantee of due process of law is
13 the right of the Accused to personally manage and
14 conduct his own defense in a criminal case.

15
16 So I would assert to you that the right of self-
17 representation is also in the 5th Amendment. Do
18 either of those amendments apply to Guantanamo
19 Bay in whole? I don't know. I certainly do.
20 You may not think that. No one else may believe
21 that. Other people may.

1 But, you don't need to decide it there either.
2 Common law, U.S. statutory law, all recognize the
3 right of self-representation, which is important
4 when you are making this decision as to whether
5 it is a fundamental right, whether it is full and
6 fair. Implicit in "full and fair" is that it is
7 recognized as universally as possible.

8
9 In 1789, the Judiciary Act of 1789 first
10 recognized a statutory right of self-
11 representation in all courts of the United
12 States, the parties may plead and conduct their
13 own cases personally, or by counsel. It has been
14 around now for 240 years.

15
16 Faretta at 820, such a result, this is from note
17 16 in Faretta, such a result, and the result they
18 are talking about is thrusting counsel upon the
19 Accused against his considered wish would sever
20 the concept of counsel from its historic roots.
21 The first lawyers were personal friends of the
22 litigant.

1 Common law, discussing the role of attorneys and
2 the role of the attorney client relationship in
3 the context of whether a guy has a right to
4 proceed pro se.

5
6 Faretta at 822, "there is something especially
7 repugnant to justice in using rules of practice
8 in such a manner as to bar a prisoner from
9 defending himself, and this is important here,
10 especially when the professed object of the rule
11 so used is to provide for his defense." Faretta
12 at 822.

13
14 That is what is happening here. The rule of
15 forcing counsel on him is essentially--it is
16 being used under the guise of providing for his
17 defense. It is also barring him from defending
18 himself, it would be repugnant.

19
20 Faretta at 826, "the common law rule has
21 evidently always been that no person charged with
22 a criminal offense can have counsel forced upon
23 him against his will." This doesn't say no

1 person in America. This doesn't say any person
2 other than someone in Guantanamo Bay. This is
3 just no person, common law, something that we
4 have all recognized.

5
6 The United States--Britain recognized it and I
7 gave--went into much more detail during my brief,
8 I believe.

9
10 When you are deciding whether something is full
11 and fair, you would look to also customary
12 international law. That is something you need to
13 consider because, again, the more times a right
14 is given, the obvious implication is that if that
15 right is given by every single of body of law out
16 there in every civilized society, it is being
17 given for a reason because it is necessary for
18 the trial to be full--excuse me, for the trial to
19 be fair.

20
21 Through customary international law the right of
22 self-representation applies. And it applies--it
23 was used throughout every tribunal in the history

1 of this world, in the last several hundred years
2 have allowed this of self-representation.

3
4 Even Slobodan Milosevic, may he rest in peace,
5 had the right to self-representation. And, he
6 had it revoked because of health reasons. That
7 opinion was fascinating because what it did, and
8 I would respectfully if Your Honor, sir, if you
9 don't have that opinion I will forward it to you;
10 the order from the court.

11
12 It went into great detail recognizing that this
13 right exists. It is fundamental, it has been
14 recognized all over the world, however, the
15 tribunal has a right as well. The tribunal has
16 right to manage its own case, to proceed in a
17 reasonable manner, which I wouldn't stand here
18 and say you don't have that right. They have a
19 right to the fair trial as well. [Pointing to
20 Prosecution]

21
22 But what that opinion does, it shows the
23 unbelievably delicate balancing test that

1 tribunal for the former Yugoslavia--that the
2 tribunal did balancing Mr. Milosevic's right with
3 the right of the tribunal to proceed, and when it
4 revoked his right of self-representation, it did
5 so in a very narrow context.

6
7 If you look at it another way, what they did is
8 sort of a constitutional analysis of a
9 fundamental right. They said, this is a
10 fundamental right. We are going to have to
11 curtail it. There has to be a compelling state
12 interest to curtail it. There was. The trial
13 needed to proceed. But we are going to only--we
14 are going to--we are going to narrowly tailor
15 that denial of a fundamental right as much as
16 possible. That is what they did in Yugoslavia.

17
18 Moussaoui had his right of self-representation.
19 He lost it. He has done nothing. Mr. al Bahlul
20 done nothing to lose his right of self-
21 representation, if it does exist. I assert it
22 does.

1 All of our tribunals and conventions for civil
2 rights, treaties, they all recognize that under
3 the----

4

5 **Presiding Officer:** You got anything else on this Major
6 Fleener?

7

8 **DC:** What is that, sir?

9

10 **Presiding Officer:** Do you have anything else on this?

11

12 **DC:** Yes, sir.

13

14 **Presiding Officer:** Okay, you have repeated yourself
15 several times on this.

16

17 **DC:** Yes, sir.

18

19 **Presiding Officer:** And I have let you do it.

20

21 **DC:** Thank you, sir.

22

1 **Presiding Officer:** So, if you want to focus, focus. But,
2 you have covered this same ground now many, many
3 times.

4
5 **DC:** Yes, sir. Faretta at 818, the 6th Amendment
6 includes a compact statement of the rights
7 necessary to a full defense.

8
9 Faretta at 8-19, this court has often recognized
10 that constitutional structure of rights, that
11 although not necessarily expressed in the
12 document are essential to due process of a law in
13 a fair adversarial process.

14
15 This right is necessary in a full and fair
16 process. An Accused can't be forced upon an
17 unwanted attorney.

18
19 **Presiding Officer:** Or vice versa?

20
21 **DC:** Oh, I apologize. An attorney can't be--an
22 unwanted attorney can't be forced upon an
23 Accused. And that comes from Lieutenant

1 Kuebler's brief, and tied in with it, and I ask,
2 Your Honor, or sir, to read the amicus by the
3 Wyoming folks. And it explains why an attorney--
4 the relationship that exists is an agency
5 relationship, it is a contractual relationship,
6 it is a consensual relationship.

7
8 Nonconsensual appointments occur, but if you read
9 the restatement to the law of lawyering, it
10 occurs in instances where the person is
11 incompetent, mentally incompetent, young, old,
12 mentally infirm.

13
14 If the only place that a person hasn't had this
15 right is the star chamber. Don't let this thing
16 become star chamberesque.

17
18 This is a fundamental right. You have the right
19 to change it. If the administration wants
20 someone to take marching orders as a defense
21 attorney to put on a full and fair trial for the
22 Accused absent--when the person doesn't want him

1 there, they need to get somebody other than an
2 attorney to do it.

3
4 Treat it like the CSRTs. Give them a personal
5 representative and let them advocate on behalf of
6 the Accused. Because when you put an attorney
7 over here, you take with him his obligations and
8 his ethics. And his--my obligation is to Mr. al
9 Bahlul and if Mr. al Bahlul looks at me and says,
10 "Boycott. Do nothing." I am going to be
11 listening to Mr. al Bahlul. That is not going to
12 provide a full and fair trial for anybody.

13
14 And all it is going to do is, as the world looks
15 at this system, it is going to have no legitimacy
16 whatsoever. Allow the man to make decisions.
17 Allow the man to do what he has a right to do.
18 Allow him to represent himself, sir.

19
20 **Presiding Officer:** Thank you. Trial?

21
22 **PROS:** Thank you, Your Honor. First, I would simply
23 like to point out, that if the Accused directs

1 his counsel to do nothing, that is his choice.
2 That is not something that is denying him a fair
3 trial. He is making a choice based on his own
4 volition.

5
6 With regard to the amicus brief filed by the
7 Wyoming lawyers, in essence, they argue that it
8 is unethical to have a lawyer forced upon a
9 defense counsel--did I say it wrong again too.
10 You know what I am saying.

11
12 That would lead to an absurd result, for example,
13 in a criminal case where by his own misconduct
14 somebody forfeits his right in--to self-
15 representation and a counsel is appointed to
16 represent him, and he says, "I don't want that
17 counsel." That counsel is still forced to
18 represent him.

19
20 So I would simply state that number one, those
21 Wyoming attorneys are not the proper ethics
22 authority in the state of Wyoming; number two,

1 their arguments are simply not applicable in a
2 criminal law context.

3
4 With regards to Faretta, I will state that, yes,
5 even the Justice that wrote the majority opinion
6 said, "It is not an easy question." And in
7 Faretta, they weren't dealing with compelling
8 state interests such as we have in this trial.
9 This is a country at war. This is a country with
10 an enemy that believes it is at war. You have
11 heard that from al Bahlul's own mouth in this
12 very courtroom.

13
14 We have a compelling state interest in national
15 security. Now, the U.S. has put forth and you
16 have it before you, we have attached it to our
17 response to our motion, our position with regards
18 to this self-representation.

19
20 I would simply point out that it has never been
21 the Prosecution position that any Accused in
22 these proceedings should be allowed unfettered
23 pro se representation.

1

2

It has always been conditioned upon also having the mandatory standby counsel because of the national security concern. So I would ask you take that into consideration when you are making your decisions here today.

7

8

Perhaps the most important thing I want to mention today though, however, is whether or not you have the individual authority to go ahead and order pro se representation in light of the procedural aspect of where we are today.

12

13

14

Normally, I think I would probably agree with the Defense that the Presiding Officer, since you are the finder of the law in these proceedings, that you could go ahead and do that as you are trying to interpret the Appointing Authority Regulations that exist.

19

20

21

However, in this case, prior Defense Counsel have already petitioned the Appointing Authority to allow for pro se representation. The Appointing

22

23

1 Authority came back on June 14th of 2005, and
2 that is RE 101, and said that his, al Bahlul's
3 request for self-representation is denied. And
4 they do reference national security in there.

5
6 So, it would be our suggestion that if you're so
7 inclined to recommend, or think that there should
8 be pro se representation of some kind in these
9 proceedings, that it has to be, by necessity--
10 referred to the Appointing Authority or certified
11 to the Appointing Authority because they have
12 already made a determination.

13
14 So in essence, you are not interpreting the law
15 by making that determination, you would be
16 overruling the Appointing Authority that has
17 already determined that is the law, that is
18 Commission Law in this case.

19
20 So, we simply state, sir, that if you're so
21 inclined that you certify the issue.

22
23 **DC:** Sir, may I say one thing, please.

1

2 **Presiding Officer:** At the start of these proceedings, I
3 mentioned to all concerned that the Assistant and
4 the Chief Clerk had put all the REs on the local
5 network. Obviously one got missed.

6

7 Before you say anything Major Fleener, let me
8 note for the record the Defense made a request
9 for a stay in the proceedings to the Appointing
10 Authority on 30 March 2006, in connection with a
11 request that the Appointing Authority change the
12 procedures to allow pro se representation.

13

14 The Appointing Authority declined to stay the
15 proceedings, did not agree to change the
16 procedures, and forwarded the request for a
17 change in procedures to the General Counsel of
18 the Department of Defense. Those matters are
19 contained in RE 185.

20

21 Yes, Major Fleener, briefly?

22

1 **DC:** Yes, sir. If MCI Number 4 had said, the Accused
2 must testify; he has no right to remain silent;
3 and must testify with truth serum and polygraphs;
4 may not have access to witnesses or evidence; may
5 not be present; and there is a presumption of
6 guilt, would you apply those rules, or would you
7 say, those rules aren't consistent with their
8 being a full and fair trial?

9
10 I would hope your answer would be you wouldn't
11 apply those rules because you recognize that they
12 are inconsistent with providing a full and fair
13 trial and you wouldn't enforce those rules. This
14 is the same thing. Mr. al Bahlul and I don't
15 want to be together. We can't help it that the
16 Secretary of Defense and his delagees have messed
17 this thing up, but they have. They are not
18 applying the President's mandate and just as you
19 wouldn't make him testify with a polygraph just
20 because Mr. Haynes says he has to; just because
21 you wouldn't apply a presumption of guilt just
22 because Mr. Haynes says it exists; just because
23 you would probably allow Mr. al Bahlul the right

1 to be present and see some of his accusers even
2 if Mr. Haynes put in the MCIs that he doesn't
3 have that right, he can't be there; you need to
4 allow Mr. al Bahlul to represent himself even if
5 Mr. Haynes or Mr. Altenburg say, "No." They can
6 appeal up.

7

8 **Presiding Officer:** Thank you. I will issue a ruling in
9 due course.

10

11 In regards to discovery, Trial [the Prosecutor]
12 filed P 101 to compel Defense compliance with the
13 discovery order. Defense answered with P 101
14 Alpha stating that the Defense had no
15 discoverable matters. We discussed this at the
16 8-5 yesterday.

17

18 Trial, at this time, are you satisfied that the
19 Defense has provided you all of the discovery
20 that it has in its possession at this time?

21

22 **PROS:** Based on their representations, yes, sir.

23

1 **Presiding Officer:** Parties for both sides realize that
2 discovery is a continuing obligation.

3
4 So that there are no questions, let me confirm,
5 on the record, the rules concerning trial
6 attendance. Counsel are responsible for knowing
7 when their trial term is scheduled. If there are
8 any questions about the trial terms, the
9 Assistant will be pleased to provide counsel a
10 personalized copy of the Trial Term Schedule.

11
12 If counsel wish to plan any activities which
13 might conflict with a scheduled trial term,
14 counsel will get permission from the Presiding
15 Officer before making those plans. Pocketbooks
16 and feelings will be spared by so doing. Any
17 questions about that, Trial?

18

19 **PROS:** No, sir.

20

21 **Presiding Officer:** Defense?

22

23 **DC:** No, sir.

1

2 **Presiding Officer:** Major Fleener, you are in the process
3 of making plans to travel for various official
4 reasons. Listen carefully because I am not
5 asking about locations. Please insure that you
6 keep the Prosecution and myself advised of the
7 time periods involved. I do not want to hamper
8 your ability to investigate the case and to
9 secure possible assistance for your client by
10 scheduling things without knowing about those,
11 okay?

12

13 **DC:** Yes, sir.

14

15 **Presiding Officer:** Major Fleener, your client has
16 expressed, on the record, his interest, or his
17 desire for some sort of legal assistance from a
18 Yemeni citizen. I am not going to categorize
19 what sort right now. Have you investigated the
20 method by which a Yemeni citizen might be able to
21 give legal advice to Mr. al Bahlul, even though
22 Commission Law currently prohibits a non-U.S.
23 citizen from serving as civilian counsel?

1

2 **DC:** Yes, sir.

3

4 **Presiding Officer:** In the travel I just mentioned, are you
5 going to attempt to find a Yemeni citizen to
6 assist Mr. al Bahlul's Defense?

7

8 **DC:** Yes, sir.

9

10 **Presiding Officer:** Major Fleener, you can sit down. This
11 is a non-responsive part.

12

13 [The DC did as directed.]

14

15 **Presiding Officer:** I believe that you and I first
16 discussed this case in an ex parte session at
17 Guantanamo on or about the 16th of November 2005.
18 Colonel Sullivan was present telephonically. We
19 had a session on the record in January 2006 and
20 more sessions on the record in March 2006. Each
21 and every time, I have expressed my concern that
22 you need an assistant on this case.

23

1 I note that in the two other cases, which were
2 held this week, in one case, the Accused had four
3 counsel at the table and three counsel were at
4 the table in another case.

5
6 I realize that your ability to get assistance
7 from the civilian bar is controlled by your
8 client's wishes. I further realize that your
9 ability to get a specific military counsel is
10 controlled by your client's wishes. Unless and
11 until your client agrees to request and accept
12 civilian counsel or military counsel, you are
13 stuck.

14
15 However, you can be provided Assistant Detailed
16 Defense Counsel. I requested on the record in
17 January and March that an Assistant Defense
18 Counsel be detailed. You told me in the 8-5
19 conference yesterday and you have sent me an
20 email, all parties got it back on the 23rd of
21 March, that you have asked for Assistant Defense
22 Counsel. Yet, none has been detailed.

1 Please put your request for Assistant Detailed
2 Counsel in writing to the Chief Defense Counsel.
3 Feel free to append the relevant portions from
4 this transcript and the January and March
5 transcripts.

6
7 Now as I say that, I realize that Colonel
8 Sullivan cannot materialize a Defense Counsel out
9 of thin air. I realize that he is limited by the
10 counsel, which are made available to him by the
11 services. However, if the United States wishes
12 to prosecute Mr. al Bahlul, under the existing
13 rules and regulations, it will require either a
14 great deal more time than any reasonable person
15 might want or it will require a second Defense
16 Counsel on this case.

17
18 Okay, let's talk about legal motions. Major
19 Fleener, earlier you asked for an extension on
20 the filing of legal motions. I gave you an
21 extension and told you that if you were to
22 request a further extension, you would have to
23 provide notice of motions in accordance with POM

1 4-3. As I understand it, reasonable minds have
2 prevailed and rather than filing notice of
3 motions, you will provide the Prosecution a list
4 of the legal motions that you intend to file,
5 referring for the sake of brevity to a listing of
6 legal motions previously made in other cases
7 which will be provided to counsel for both sides
8 by Mr. Hodges. Is that right?

9
10 **DC:** Yes, sir.

11
12 **Presiding Officer:** Trial, is that okay with you?

13
14 **PROS:** Yes, Your Honor

15
16 **Presiding Officer:** Obviously, Major Fleener, if you have
17 legal motions that are not on the list provided
18 by Mr. Hodges, you got to file notice if you want
19 extension to file them. Got any questions about
20 that?

21
22 **DC:** Yes, I do.

1 **Presiding Officer:** Okay.

2

3 **DC:** I am sorry. I thought I didn't--okay.

4

5 **Presiding Officer:** Mr. Hodges is going to give you a list.

6

7 **DC:** Right.

8

9 **Presiding Officer:** That is list is going to have A through

10 ZED, and then A prime through ZED prime.

11

12 **DC:** Yes, sir.

13

14 **Presiding Officer:** It is going to have lots of motions on

15 it.

16

17 **DC:** Yes, sir.

18

19 **Presiding Officer:** If your motion happens to be a legal

20 motion that these proceedings must be held by the

21 U.N. Security Council, which is a motion that for

22 reasons I don't know, has not yet been filed in

1 any of these proceedings; you are going to have
2 to file notice of a motion on that.

3

4 **DC:** Yes, sir.

5

6 **Presiding Officer:** Okay?

7

8 **DC:** Yes, sir. By April 18th?

9

10 **Presiding Officer:** If you want an extension for that---

11

12 **DC:** Ask for it.

13

14 **Presiding Officer:** For the ones that are not on the list.

15

16 **DC:** Roger, sir.

17

18 **Presiding Officer:** Anything else from the Defense before
19 we recess?

20

21 **DC:** No, sir.

22

23 **Presiding Officer:** Trial?

1

2 **PROS:** No, Your Honor.

3

4 **Presiding Officer:** We will meet on future call. The

5 Commission is in recess.

6

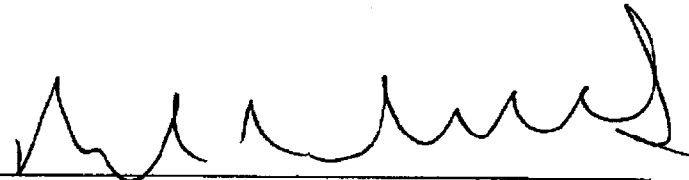
7 *The Commission Hearing Recessed at 1010, 7 April 2006.]*

**AUTHENTICATION OF
FINAL SESSION TRANSCRIPT**

in the case of:

United States v. Ali Hamza Sulayman al Bahlul
a/k/a/ Ali Hamza Ahmed Suleiman al Bahlul
a/k/a Abu Anas al Makki
a/k/a Abu Anas al Yemeni
a/k/a Mohammad Anas Abdullah Khalidi

This is to certify that the pages 408 through 457
(Authentication page) are an accurate and verbatim
transcript of the proceedings held in the above styled
case on April 7, 2006.



Peter E. Brownback III
Colonel, USA

18 APRIL 2006

DATE